No. 13,246

IN THE

United States Court of Appeals

For the Ninth Circuit

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY (a corporation),

Appellant,

vs.

JOSEPH J. SEAMAS,

Appellee.

APPELLEE'S REPLY BRIEF.

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OPENING STATEMENT.

This is an appeal by the defendant from a judgment in favor of the plaintiff in an action brought pursuant to the Federal Employees' Liability Act (45 U.S.C.A., Sec. 51 et seq.) to recover damages for injuries alleged to have been sustained as a result of the alleged negligence of the defendant.

The complaint alleged that on December 9, 1950, plaintiff was an employee of the defendant and while acting in the course and scope of his employment at defendants Mormon Yard in the City of Stockton the defendant, its servants, agents and employees negli-

gently and carelessly moved a locomotive engine and railroad box cars as to cause plaintiff to be thrown from a railroad box car onto which he had climbed to operate a hand brake and as a result of which plaintiff was injured (R. 3-6). Plaintiff subsequently and by an order of Court amended his complaint praying for additional damages (R. 9-13).

The defendant answered by way of three affirmative defenses, namely, that plaintiff's own negligence caused and contributed to his injuries and damages, that plaintiff's injuries and damages were solely caused by his own negligence and that plaintiff's injuries and damages were caused by an unavoidable accident (R. 7-8, 13-14).

On the issues thus framed by the pleadings the cause was tried before the Honorable George B. Harris, Judge, presiding, with a jury and resulted in a verdict in favor of the plaintiff for $22,500.00 and judgment on the verdict was duly entered (R. 16-17).

Thereafter, the defendant moved for a new trial (R. 17-19). The motion for a new trial was denied (R. 20) and defendant appealed.

Appellant in its specification of errors complains as follows:

1. That the trial Court erred in giving to the jury appellee's requested instruction No. 23 which reads as follows:

> "When a foreman gives an employee an order, either expressly or by implication, the employee has a right to assume in the absence of warning

or notice to the contrary, that he would not thereby be subjected to injury." (R. 357.)

and

2. That the damages awarded to the appellee by the jury were so grossly excessive that it appears that they were given under the influence of passion or prejudice.

A brief statement of the facts with applicable references to the transcript of record is as follows:

STATEMENT OF THE CASE.

Appellee was injured in the course and scope of his employment with the appellant Santa Fe Railroad on December 9, 1950, at appellant's Mormon Yard located at Stockton, California (R. 32, 41).

Appellant's railroad tracks involved in this action and as shown by plaintiff's Exhibit 3 for illustrative purposes only are laid out in such a manner so that one track designated as the No. 1 track, but sometimes called the No. 1 lead track converges with another track designated as the No. 10 track, but sometimes called the back lead. The tracks are laid out in a general east-west direction with the No. 1 track being to the north and the No. 10 track being to the south. From the point where the No. 1 track and the No. 10 track converge there is formed a single track designated as the tail track. In the area between the No. 1 track and the No. 10 track are other tracks connected to these two and are designated by numerical sequence. The No. 2, 3, 4, 5 and 6 tracks are connected to the No. 1 track and tracks 7, 8 and 9 are connected with

the No. 10 track. Each of these tracks has a switch located at or near the point where the track connects with either the No. 1 or No. 10 track and these switches are designated as the No. 2, 3, 4, etc., track switch. The tracks curve slightly in a concave manner. (Plaintiff's Exhibit 3 for illustrative purposes only, R. 37-39.)

By this arrangement of the tracks an engine pulls a string of cars towards the east onto the tail track and backs toward the west. When sufficient speed is obtained the pinpuller removes a coupling pin, the engine stops and the released car or cars roll onto a desired track which has had its switch arranged for that purpose.

Appellee, Joseph John Seamas, was a switchman in the employ of the appellant, Santa Fe Railway (R. 29). At the time he was injured he had 14 years experience as a switchman (R. 82). He was injured on December 9, 1950, at appellant's Mormon Yard located at Stockton, California (R. 32), while working as a member of a train crew engaged in making switching movements. Other members of the crew and their respective callings were foreman, L. A. Mahan; switchman (pinpuller), Sidney Albert Weith; fireman, Milton G. Strain; engineer, Bond H. Marrs, and appellee, who was working as a switchman (Fieldman) (R. 34, 35). The acting engineer at the time appellee was injured was fireman, Milton G. Strain (R. 153).

Seamas was injured about 10:00 P. M. It was very dark and there existed at that time an intense tule

fog (R. 37, 130, 131, 153). Immediately prior to this time the crew had coupled a string of five cars to the engine and proceeded along the No. 10 track or back lead in a general easterly direction toward the tail track (R. 42, 131, 153). The east of the string of five cars was destined to go to No. 9 track, and as the engine passed the No. 9 switch Seamas stepped off the cars (R. 42, 46, 47, 155, 284) lined the No. 9 switch and proceeded in a northerly direction toward the No. 3 switch where this track connects with the No. 1 track (R. 45). He then lined No. 3 switch and proceeded in an easterly direction along the No. 1 track to the position of the No. 5 switch where that track connects with the No. 1 track (R. 46) and after lining the No. 5 switch he proceeded toward the No. 6 switch where that track connects with the No. 1 track (R. 44).

At a point between the No. 5 and No. 6 switch, Seamas observed that the last of the five cars which was destined for track No. 9 had been kicked by the engine. This car did not roll as intended but came to rest on the No. 10 track so near the point where the No. 1 and No. 10 tracks converge that this car blocked the path for the next car which was destined to roll along the No. 1 track (R. 44). To avoid injury to the cars Seamas called this to Foreman Mahan's attention. Foreman Mahan did not throw the bull switch and the second car rolled against the first car and coupled on to it (R. 44, 88, 89). Foreman Mahan's position was at the bull switch, and he was directing the switching movements which diverted the cars onto either the No. 1 or No. 10 tracks by

giving lantern signals to the engineer (R. 132-133). Seamas then checked to see that the coupling on these two cars had made and proceeded to the north end of the second car or the eastern most of the two cars where Foreman Mahan was located (R. 44, 89, 90). "He then said to Mahan, 'I am going to go up and check that brake to see whether the brake was set' and he (Mahan) says, 'Okay, kid, go ahead' " (R. 44, 89-90). Seamas then walked on the north side of the two cars, climbed up the ladder on the northwest end of the western most of the two cars to check the brake and when he got to the brake platform he was knocked off (R. 44-45).

While Seamas was in the area of the brake platform and immediately prior to being knocked off Foreman Mahan, who was at the bull switch directing the movements by lantern, signalled acting Engineer Strain to back up and then walked away from the switch (R. 163-164). It was the custom to give a slow signal before cars are coupled and a stop signal just before a coupling is made. This was not done in this instance (R. 134-135, 166-168). The engine with a cut of three cars coupled to it backed up and rammed up against and into the two cars which had stopped (R. 135). The impact was hard (R. 164-165). Immediately after the impact there was a violent stop signal (R. 165-166). The impact knocked Seamas off the brake platform. He fell from a height of 10 to 12 feet on his hands and knees on rough ground north of the position from which he was knocked off (R. 53-54). He was able to get up and experienced a burning pain from his knees on up to the small of

his back (R. 54). Immediately thereafter in response to "Are you hurt son?" asked by Foreman Mahan he replied, "My legs and back are pretty sore" (R. 55).

There was no warning of any kind given to Seamas that this back-up movement was going to be made (R. 50).

Acting Engineer Strain testified that it was customary for the foreman to protect the members of the crew when any member is outside the view of the Engineer (R. 181).

Foreman Mahan denied that he gave Seamas authority to check the brake and denied that he knew that Seamas was in the area of the brake platform (R. 286-290).

Upon completion of the shift Seamas returned home and about 12:00 A. M. that same night, he visited Dr. C. A. Luckey, an orthopedic surgeon who taped his back and gave him some pain pills (R. 59-60, 240-241.) The following day he began to feel worse and called Dr. Weiss, a Santa Fe Company doctor who treated him with heat treatment, pills, shots and advised him to lay on a hard bed (R. 61-62).

On January 3, 1951, he was placed under the care of Dr. C. A. Luckey and was immediately hospitalized at St. Joseph's Hospital a Stockton. He was placed in traction for about 12 days and was released from the hospital on January 19, 1951. Dr. Luckey prescribed a steel brace or corset which fitted around the small of his back which Seamas was still wearing at the time of the trial. He saw Dr. Luckey every day for a month and a half and every other

day for another month and a half for heat and rubbing treatments (R. 64-68). He was able to walk slowly with the aid of a cane and experienced pain even when he walked slowly (R. 70). He discarded the cane after four or five months on the suggestion of the doctors (R. 70). At the request of the railroad company he was examined thoroughly by Dr. Dickson, who took X-rays and advised him to continue with treatments given by Dr. Luckey (R. 71-72). Dr. Dickson did not testify. He was also examined by Dr. McCoy (McCloy) five or six times (R. 72).

At the time of the trial he was experiencing pain in the back of his legs and in the small of his back. He experienced severe pain on backward and forward bending. His lifting power was limited to 15 or 20 pounds. He could not stoop down to pick up objects unless he got down on his hands and knees, and he could not walk up and down stairs without experiencing pain. He had difficulty in sleeping and resting at night and got relief only by sleeping on the floor (R. 73-74).

His health prior to the accident was, "Very Good" (R. 74). He had been hospitalized in 1939 for about a month and after examination by Santa Fe Doctors he was released and returned to work (R. 75-76). He had hurt his hip in 1946 or 1947, lost about ten or fifteen days work and after being released he returned to work (R. 76-77).

At the time of the accident he had been working on a seven day job, and his earnings were between $12.21 to $13.11 per day depending on the work he

was assigned to perform. For the three months immediately preceding the accident he had earned $516.24 for September, $387.38 for October, and $351.38 for November (R. 77-79, Plaintiff's Exhibit No. 2 in evidence). He had not worked since his injury (R. 80). He was 37 years of age (R. 29) and his average life expectancy was 31.75 years (R. 341, 366).

ARGUMENT.

I.

The instruction requested by appellee and given by the Court to the affect that "when a foreman gives an employee an order, either expressly or by implication, the employee has a right to assume, in the absence of warning or notice to the contrary, that he would not thereby be subjected to injury" was a proper instruction.

In support of this instruction plaintiff cited *Republic Iron and Steel Co. v. Berkes,* 70 N.E. 815. The facts of the cited case are substantially as follows:

Plaintiff was an employee of the defendant, engaged as a common laborer in its factory. While engaged in this work, plaintiff was under the control and orders of one Flack, who was a foreman of the defendant at the factory where plaintiff worked.

At the time of the accident plaintiff and another laborer of defendant were directed and required to

cut into small pieces a long, crooked and warped iron bar by means of large iron shears, the jaws of which worked up and down at regular intervals. Immediately prior to the accident plaintiff and the other laborer had placed a bar of iron in the jaws or mouth of the shears, and had pushed it as far back as possible, so that when the knives of the shears came together they would cut the iron into square pieces without turning the bar over.

At this point Flack, the defendant's foreman, called to the plaintiff not to cut the bar of iron at the point where plaintiff was about to cut it, but to cut it at another point.

In obedience to this order given by the foreman, plaintiff began to remove the bar from the shears in order to place it in a position to be cut where the foreman had ordered him to cut it. As plaintiff was in the act of removing the bar, the shears came down and caught the bar of iron and flopped it over against plaintiff's leg injuring him. Plaintiff "had no notice or warning that in attempting to withdraw the bar as he did he would expose himself to any danger or injury".

The jury, on these facts, found for the plaintiff, and from a denial of defendant's motion for a new trial, defendant appealed.

In affirming the decision, the Court held in part that plaintiff's duty as the servant of appellant was to yield obedience to the orders of his superiors. In fact, it appears that he was obeying a specific order of the foreman, under whose control and authority

he had been placed by the master. He had the right to presume, in the absence of warning or notice to the contrary, that in conforming to the order he would not be subjected to injury.

Plaintiff's instruction No. 23 is based upon the law of the *Berkes* case which is in conformity with general principles relating to the rights and duties of an employee or servant who is obeying the orders or commands of his superiors who have direction and control over him. The principal of law encompassed by the instruction is substantially set out in Vol. 16 Cal. Jur. page 1070 where it is said:

> "If the master gives an order to work at a particular place and gives no warning of danger, the servant may rightfully assume, in the absence of information to the contrary, that it is free from danger from causes under the master's control and which he could remove with reasonable care and effort and which are not apparent to the servant after such observation as the circumstances reasonably require."

Citing:

Green v. Varney, 165 Cal. 347, 132 Pac. 436;
Reeve v. Colusa Gas and Electric Co., 152 Cal. 99, 92 Pac. 89;
Silveira v. Iversen, 128 Cal. 187, 60 Pac. 687.

This general rule is especially applicable where an employee is acting under the direct supervision of a foreman or superintendent. The employee is entitled to rely upon the foreman's or superintendent's superior knowledge without being required to make

an examination of his own to see whether the foreman or superintendent has performed his duty.

Price v. Northern Electric Ry. Co., 168 Cal. 173, 142 Pac. 91;

Carl v. San Francisco Bridge Co., 131 Cal. App. 339, 160 Pac. 570;

Petersen v. California Cotton Mills Co., 20 Cal. App. 751, 130 Pac. 169.

The order or direction of the superior to have the employee perform a given task does not have to be express but may be implied from the circumstances.

Miller v. Cookson, 89 Cal. App. 602, 265 Pac. 374.

The rule is inapplicable where the employee is warned of the danger or where the danger is so obvious that an ordinarily prudent person would have noticed it and disobeyed the instruction or order given by the foreman.

Hall v. Clark, 163 Cal. 392, 125 Pac. 1047;

Lemmerman v. Pope & Talbot, 42 Cal. App. 192, 183 Pac. 467.

Generally speaking nothing is law that is not reason and the general principle incompassed by the instruction is based upon the very fact that the master and the servant are not on the same footing. The servant's primary duty is obedience. If he fails to obey, the servant is dismissed from his employment. The servant has a right to rely upon the ability and skill of the master or his agent or foreman in whose charge the

servant has been placed, since the tendency of an order is to throw the servant off his guard.

The servant has a right to assume that the master has performed his duty since the servant shapes his course of conduct in reliance on this principle that the master has done his duty, and he cannot be charged with contributory negligence for having obeyed the order of his superior in an action for injuries received in attempting to follow the order.

Southern R. Co. v. Hart, 1901, 23 Ky. L. Rep. 1054, 64 S.W. 650.

This is especially true in the instant case since the evidence discloses that it was the custom to have the foreman protect the men when they were working outside the view of the engineer (R. 181).

Appellee's instruction No. 23 does not mean, as appellant asserts, that no employee has a right to assume, when obeying an order, that the employee will not be hurt under any circumstances. It means in substance nothing more than that, in obeying an order of his superior, the employee, has a right to assume that the employer has exercised ordinary care for the employee's safety when the employee acts in pursuance of the order or command. A fair and reasonable interpretation of this language found in the instruction complained of can give it only this meaning. The instruction can only be interpreted to mean that the employee does not assume the risk of his employment. It merely states the law of the 1939 amendment to the Federal Employers' Liability Act which

obliterated from the Act the doctrine of the assumption of risk as a defense.

45 U.S.C.A. Section 51, et seq;

Larsen v. Chicago & N. W. Ry. Co., 171 Fed. (2d) 841.

The instruction was proper and appropriate under the facts and circumstances and especially in the light of Mr. Mahan's testimony on direct examination in this regard (R. 289):

"Q. Is he permitted without permission from you to get on the north side of the cars?

A. Well, not necessarily. *He got on there at his own risk.*" Emphasis added.

In a similar case a switchman working under orders of a foreman in "kicking" cars upon a switch track at night did not assume the responsibility or risk of such movement.

Cinn. N. O. & T. P. Ry. Co. v. McGuffy, 252 Fed. 25, 164 C.C.A. 137.

Appellant assumes that appellee was guilty of contributory negligence merely because of the usual custom of the train crew to work on the engineer's side of the tracks, or the south side of the tracks, but there is nothing in the evidence to indicate that any custom existed of boarding or going onto box cars, which had stopped on the engineer's side to test a hand brake which was suspected to have been stuck. By the implied verdict of the jury it is reasonable to assume that appellee had gone to the place where he had been impliedly ordered to go, that Mr. Mahan knew that

he was in the area of the hand brake and that Mr. Mahan failed to protect appellee when he was outside the view of the engineer in violation of established custom (R. 181). There is nothing in the evidence to indicate appellee was guilty of contributory negligence. There was no warning given to him that a back-up movement was going to be made (R. 50), and there was no evidence that appellee had any knowledge that the movement was being made.

Appellant has cited numerous authorities which set forth general principles of law applicable to a case brought under the Federal Employers' Liability Act which were appropriately covered by the trial Court in its charge to the jury. The trial Court instructed on appellant's duty to use ordinary care (R. 362-363). It instructed on contributory negligence and its affect on a case brought under the Federal Employers' Liability Act. The Court further charged the jury as follows (R. 358):

> "I further charge you that the railroad company does not insure or guarantee its employees against the possibility of accident. Its duty is to exercise ordinary care. Insofar as it performs that duty, it fulfills the law and incurs no liability for accidental injury. Inherent in the nature of a railroad business are certain hazards, but even such dangers do not make the company an insurer or change the rule of liability that I have stated, although, in the exercise of ordinary care, the amount of caution required increases as does the danger that is known or that reasonably should be apprehended in the situation."

Appellant has not called our attention to any other instruction given by the trial Court which appears to be contrary to or inconsistent with Appellee's Instruction No. 23. The instructions given by the Court must be taken and looked upon as a whole. A party cannot be heard to complain of a deficiency in one instruction when the deficiency complained of is adequately and properly covered by other instructions given by the Court. The instructions given should be considered in connection with each other, and if the charge as a whole fairly and accurately states the law, a new trial should not be had because isolated sentences and phrases may be open to criticism, or because a separate instruction may not contain all of the conditions and limitations which are to be gathered from the entire charge to the jury.

Cavagnaro v. City of Napa, 86 Cal. App. (2d) 517, 195 Pac. (2d) 25;

Wood v. Moore, 64 Cal. App. (2d) 144, 148 Pac. (2d) 91.

There are no authorities which even suggest the untenable interpretation which defendant seeks to give plaintiff's instruction.

There is nothing in the instruction to suggest that defendant was prejudicial thereby.

II.

The damages awarded to appellee are not excessive. It does not appear from appellant's opening brief upon what ground or grounds appellant relies in its

complaint that the verdict of $22,500.00 was excessive and relief upon this ground is addressed to the sound discretion of the Court.

The verdict here is really very moderate, in view of the severity and permanency of the injuries and the high earning capacity of appellee. His injuries were in the main soft tissue injuries between the lumbar region and the sacrum. The injuries included the joints of the spine, the ligaments around the joints, and the rest of the soft tissue structure such as the intervertebrae disc with a derangement of the intervertebral disc of the third lumbar vertebrae (R. 200-207).

It would serve no useful purpose to fill the pages of this brief with citations of and excerpts from other cases where verdicts were held not excessive. It is therefore more appropriate to summarize briefly for the Court the evidence which supports the verdict and the elements of damage which must have unquestionably been considered by the jury:

1. Present loss of earnings as an element of damages.

Appellee is 37 years old. He has an average life expectancy of approximately 31.75 years (R. 341, 366). For the period immediately preceding the accident out of which this cause of action arose and representing about one year, appellee had earned a little over $4,477.19 or an average of some $375.00 per month, up to the time of the trial of this cause appellee's loss of earnings were approximately $4,125.00 (Plaintiff's Exhibit No. 2 in evidence). Present loss

of time and earnings are universally considered as a proper element of damages.

Chicago D. & G. B. Transit Co. v. Moore, 259 Fed. 490, 170 C.C.A. 466, certiorari denied 40 Sup. Ct. 118, 251 U.S. 553, 64 L. Ed. 411.

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2. Future loss of earnings reasonably to be anticipated as an element of damages.

Future loss of earnings and impairment of earning capacity are properly considered as an element of damages when they are reasonably to be anticipated.

25 Corpus Juris Secundum, Section 87, p. 619.

Dr. Neil P. McCloy testified (R. 204):

Q. And do you feel that he will be able to carry on his duties as a switchman in the future?

A. I think it may be possible in a year or two, but I rather feel it would be improbable——

Q. Do you feel——

A. Pardon me—because of the nature of the work, which requires a great deal of climbing and agility.

Q. Do you feel that he would be better off by doing lighter work?

A. Yes, I do.

He further testified (R. 203):

Q. Mr. McCloy, have you reached an opinion as to whether or not the injuries which Mr. Seamas has suffered are permanent?

A. Mr. Seamas has sustained some permanent injuries which will consist of pain in his lower back in extremes of motion, and approximately 20 to 25 degrees restriction of the motions of forward and backward bending, and bending to

the right, together with some weakness of the back, and pain in the back on hard use.

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3. Present and future physical pain, suffering and discomfort as an element of damages.

As Dr. McCloy testified (R. 204) there can be little doubt that an injury which produces permanent changes and permanent disability can be readily classified as severe. The distress suffered by a person with a severe back injury is almost always acute. It is a portion of the human anatomy which of necessity we are required to use constantly, even in turning over in our sleep. Appellee has suffered considerable pain and will continue to experience pain in the future on hard use. He has difficulty in resting and sleeping. He is required to sleep on a hard surface and quite frequently he must resort to sleeping on the floor to obtain relief (R. 73-74).

He was treated by Dr. Weiss for a period of one month, and by Dr. Luckey for a period from January 3, 1951, until about July 26, 1951. Appellee was seen by these doctors every day for many weeks, then the visits were decreased gradually to twice each week. It is reasonable to assume that appellee is and was in considerable distress or these gentlemen would not have continued treating him. He was hospitalized and placed in traction for a period of ten to twelve days. He has been wearing a brace for many months, and he will have to continue its use for several more months until after a period of exercise therapy he is able to support himself (R. 228-229).

On present and future pain, suffering and discomfort as an element of damage see:

25 Corpus Juris Secundum, Section 62, p. 548.

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4. Mental disturbance, suffering and emotional shock as an element of damage.

It was admitted by both Dr. McCloy and Dr. Luckey that appellee was not malingering and that his posture is not a feigned posture (R. 191, 229, 248). Plaintiff's mental condition has suffered and has been severely disturbed. (Dr. McCloy called this condition apprehension (R. 219) and Dr. Luckey attributed appellee's mental condition to traumatic neurosis or a functional overlay (R. 265-266). Both doctors agreed that this mental condition was associated with the accident, and it will prolong appellee's pain and suffering and his recovery will consequently be retarded (R. 218, 220, 227). It is an element of damage which the jury properly considered in its verdict.

Mental suffering constitutes an aggrevation of damages when it naturally ensues from the act complained of, and in this connection mental suffering includes fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation and indignity, as well as physical pain.

Deevy v. Tassi, 21 Cal. (2d) 109, 130 Pac. (2d) 389, on hearing after 50 A.C.A. 377, 122 Pac. (2d) 942.

This case is prosecuted under Federal Law. The extent of future disability is a factual question for

the jury. That fact finding body had the right to accept as true, any testimony, regardless of conflict. We deem it appropriate to quote the following language of the Supreme Court of the United States in a decision handed down March 25, 1946, in the case of *Lavender v. Kurn,* 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916, at page 922:

> "The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historical function for an appellate court to weight the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. See Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 67, 68; 87 L.Ed. 610, 617, 618; 63 S. Ct. 444; 143 A.L.R. 967; Bailey v. Central Vermont R. Co. 319 U.S. 350, 353, 354; 87 L. Ed. 1444, 1447, 1448; 63 S. Ct. 1062; Tennant v. Peoria & P. U.R. Co., 321 U.S. 29, 35; 89 L. Ed. 520, 525, 64 S. Ct. 409; 15 N.C.C.A. (NS) 647. See also Moore, 'Recent Trends in Judicial Interpretation in Railroad Cases under the Federal Employers' Liability Act', 29 Marquette L. Rev. 73.
>
> It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible

> error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when the evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

In summary it may be rightfully stated that appellee has been railroading nearly all of his working life. It is the only calling that he has had training for. It is the only work he is familiar with and knows how to do. As a result of this accident, it may honestly be said that he is finished and through railroading. Certainly no railroad company would want to hire appellee in view of his permanent back condition. It is certain that appellant does not want appellee to return to his former work as a switchman. In view of the condition of appellee's back, he will be required to seek employment in some field of endeavor requiring much less agility and strength.

Taking into consideration these elements of damage which we may assume the jury properly considered, it cannot be said that the verdict was given under the influence of passion or prejudice. The jury was entitled to consider all these elements of damage in arriving at a fair conclusion and their verdict is supported by substantial evidence. There is nothing in the verdict which at first blush would shock the conscience of the Court. In view of appellee's in-

juries and permanent disability even a larger verdict would have been proper.

We respectfully contend that the judgment should be affirmed.

Dated, Stockton, California,
May 26, 1952.

Respectfully submitted,
MICHAEL AND PAPAS,
Attorneys for Appellee.